ORIGINAL

NO. 2009-0627

In the Supreme Court of Ohio

DIRECTV, INC., and ECHOSTAR SATELLITE L.L.C.,

Plaintiffs-Appellants,

v.

RICHARD LEVIN, Tax Commissioner of Ohio,

Defendant-Appellee.

On Appeal From The Court of Appeals,
Tenth Appellate District
Case No. 08AP-32

BRIEF OF AMICI CURIAE TIME WARNER CABLE, COMCAST, AND COX COMMUNICATIONS IN SUPPORT OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

INTERESTS OF AMICI CURIAE

Amici cable service providers, Time Warner Cable, Comcast, and Cox Communications (hereinafter "amici") operate throughout the United States, including Ohio, providing video programming services. Amici have a shared interest in this litigation because its outcome could alter the economic playing field on which both cable and satellite providers compete in Ohio and could influence the outcome of similar litigation pending in other states. A finding that Ohio Rev. Code Ann. § 5739.01 et. seq. (hereinafter the "Satellite Equalization Tax") is unconstitutional would provide Appellants DIRECTV, Inc. and Echostar Satellite L.L.C. (hereinafter the "Satellite Companies" or "Appellants") with an economic advantage over cable operators in the provision of their services and would irrevocably alter the competitive marketplace in the pay-for-service TV broadcast market. Viewed through that lens, the challenge to the constitutionality of the Satellite Equalization Tax by the Satellite Companies is less about an attack on the statute than about an attack against cable operators and an effort to regain a tax and regulatory competitive advantage in the marketplace. As the principal cable providers that will be affected directly by the Court's ruling in this case, amici have a significant and tangible interest in the outcome of this case.

STATEMENT OF THE CASE

This case presents the question of whether the Ohio Court of Appeals correctly concluded that Ohio's tax on satellite television service does not discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. The Satellite Companies claim that a tax on satellite services discriminates against interstate commerce even though they engage in substantial in-state activities in providing their interstate service. The crux of the Satellite Companies' claim is that their principal competitors, national cable companies, which likewise engage in substantial (albeit different) in-state activities in providing a similar interstate service, are somehow "more" in-state than the Satellite Companies and, accordingly, that Ohio's tax discriminates against interstate commerce in violation of the Commerce Clause. The Satellite Companies' novel theory has no basis in law or policy. The U.S. Supreme Court has never held that a tax discriminates against interstate commerce on the basis of a comparison of relative amounts of substantial, but different, in-state activity in which competing interstate enterprises engage. The reason for this is apparent and is demonstrated by the undisputed facts of this case. Any effort to distinguish between competing enterprises engaged in interstate commerce based on the extent of their substantial, but different, in-state activity has no grounding in Commerce Clause jurisprudence and would embroil courts in a standardless inquiry into the relative "in-stateness" of different types of substantial in-state activities.

The Satellite Companies provide direct broadcast satellite video programming services to over 678,000 consumers throughout Ohio. (Compl. ¶7-8.) The Satellite Companies own and lease property throughout the state including thousands of miles of fiber optic cable, satellite dishes, satellite receiving equipment and "set top boxes." (See, e.g., id. ¶14-15; Stip. of Facts ¶1-4.) The Satellite Companies also utilize thousands of Ohio employees, independent contractors, and third-party sales representatives to sell, install, and maintain their services in Ohio.

Numerous cable television providers, including amici (hereinafter the "Cable Companies") provide video programming services to hundreds of thousands of consumers throughout Ohio. To deliver their service, the Cable Companies use out-of-state satellites to beam their programming to regional "headend" facilities. (Compl. ¶20.) The video programming signals are then transmitted over coaxial and fiber optic cable to Ohio consumers. (Id.) Like the Satellite Companies, the Cable Companies also utilize thousands of employees, independent contractors, and third-party sales representatives to sell, install, and maintain their services.

Both cable and satellite service providers purchase video programming from content providers like Disney and HBO. (Id. ¶16.) The content providers transmit both cable and satellite video programming to satellites for distribution. The Satellite Companies transmit the signal from their satellite(s) to receiving equipment affixed to consumers' premises. (Id. ¶14.) The Satellite Companies also use fiber optic cable located throughout Ohio to transmit local network channels (e.g., ABC, NBC, and CBS network affiliates) to their customers. (Id. ¶17.)

Ohio Cable Companies are required to pay local franchise fees at rates up to 5.26 percent of their gross receipts.[1] These fees are charged to cable customers as separately stated line items on their bills in accordance with the Cable Act[2] and are economically equivalent to any sales tax collected from consumers for satellite service. Additionally, the Cable Companies are required to contribute to other regulatory programs that increase the effective tax rate on their services to approximately 6.35 percent.[3] These in-kind governmental exactions are, at least in part, reflected in the cost of the customer's monthly cable services charge. In contrast, before 2003, no state or

[1] 47 U.S.C. § 542(b) caps franchise fees at 5 percent of a cable operator's "gross revenues… from the operation of the cable system to provide cable services." However, if the cable operator passes the entire cost of the franchise fee onto the consumer, as it routinely does, the 5 percent charge is imposed upon the franchise fee itself resulting in a total franchise fee of up to 5.26 percent.

[2] The Cable Communications Act of 1984, Pub. L. No. 98-549, Title VI, § 622(b), 98 Stat. 2779 (1984), reprinted in 47 U.S.C. § 542.

[3] A recent study by the Heartland Institute concluded that in Columbus, Ohio, the effective tax on cable service providers is 6.35 percent. (David Tuerck, Ph.D. et al, *Taxes and Fees on Communication Services*, The Heartland Institute (2007), at 8.) "Franchise fees, access fees, and initial capital grants are the three most prominent industry-specific fees imposed on cable companies offering video service. In addition, state and local sales taxes, public utility taxes, and other transactional taxes often apply to these companies." (Id. at 5.)

local taxes or fees were imposed on or with respect to services provided by the Satellite Companies. (Compl. ¶2, 33.)

In June of 2003, the Ohio General Assembly amended Ohio Rev. Code Ann. § 5739.01 et. seq., the Satellite Equalization Tax, imposing a 6 percent state sales tax on video programming services provided by direct broadcast satellite companies.[4] The Satellite Equalization Tax effectively equalized taxes and fees imposed on all types of video programming services and ensured that Ohio consumers received a tax-neutral choice.

Seeking to eliminate the equalizing tax imposed on their services, the Satellite Companies brought suit alleging that the Satellite Equalization Tax discriminates against interstate commerce. In their Complaint (the "Complaint"), the Satellite Companies characterized themselves as "out-of-state" businesses and described Cable Companies as "local" or "in-state" businesses.

The Complaint made limited reference to the Satellite Companies' extensive infrastructure in Ohio, which includes millions of dollars worth of equipment and fiber optic cable, legions of employees and independent contractors, and thousands of third-party sales associates. (Compl. ¶¶12-19; Stip. of Facts ¶¶1-4.) Rather, the Complaint portrayed the Satellite Companies as out-of-state businesses by describing only their use of satellites and out-of-state uplink equipment.

The Ohio Court of Appeals rejected the Satellite Companies' claims and upheld the Satellite Equalization Tax. The Court of Appeals found that the Satellite Equalization Tax is a geographically neutral sales tax, applies to sales made by Satellite Companies that are not

[4] As originally enacted in 2003, the sales tax rate was 6 percent. R.C. 5739.02(A)(1) (2003). On or after July 1, 2005, the state sales tax rate was amended to 5.5 percent. Id.

identifiably in-state or out-of-state entities, and imposes no burden upon interstate commerce. *DIRECTV, Inc. v. Levin* (2009), 181 Ohio App.3d 92 (hereinafter "Op.").

The Satellite Companies now bring this appeal asking this Court to adopt the theory that state taxes on satellite television service discriminate against interstate commerce unless an identical tax is imposed on cable television service. They do so even though this theory has been rejected by every court that has reviewed the issue. The United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals for the Sixth Circuit, and the North Carolina Court of Appeals have dismissed almost identical challenges by Satellite Companies seeking to invalidate state taxes on their services. See *DIRECTV, Inc. v. North Carolina* (2006), 178 N.C.App. 659, 632 S.E.2d 543; *DIRECTV, Inc. v. Treesh* (E.D.Ky. 2006), 469 F.Supp.2d 425, affirmed (C.A.6, 2007), 487 F.3d 471, certiorari denied (2008), 128 S.Ct. 1876, 107 L.Ed.2d 746; *DIRECTV, Inc. v. Tolson* (E.D.N.C. 2007), 498 F.Supp.2d 784, affirmed (C.A.4, 2008), 513 F.3d 119. In fact, rather than discriminate against interstate commerce, the Satellite Equalization Tax actually levels the playing field, allowing Ohio consumers to choose a television service provider without regard to state taxes and fees.

The Satellite Companies face a heavy burden of proving that the Satellite Equalization Tax discriminates against interstate commerce. Legislative acts are presumed to be constitutional, and this Court should indulge every reasonable presumption of constitutionality to save a statute from constitutional attack. See e.g., *State ex. rel. Mack v. Guckenberger* (1942), 139 Ohio St. 273, 39 N.E.2d 840. The Satellite Companies have not met their burden, and the Court of Appeals' decision rejecting the Satellite Companies' claims must therefore be affirmed.

ARGUMENT

This Court should affirm the Court of Appeals' decision because (1) the Satellite Companies are engaged in substantial in-state activity in providing an interstate service, and the

Commerce Clause provides no basis for a claim of discrimination in favor of other companies engaged in substantial in-state activity in providing an interstate service; (2) the Satellite Equalization Tax is geographically neutral, both on its face and in effect;[5] there is no geographic component to the Satellite Equalization Tax, and any differential tax treatment between satellite and cable providers results not from the location of their operations but from the differing nature of their activities; and (3) the Satellite Equalization Tax was enacted to generate revenue and provide Ohio consumers with a tax-neutral choice of television service providers. Moreover, every other court to consider an alleged tax discrimination against satellite providers in favor of cable providers has rejected the underlying premise of the Satellite Companies' argument, namely, that the Satellite Companies are "out-of-state" while the Cable Companies are "in-state" for Commerce Clause purposes.

I. THE SATELLITE EQUALIZATION TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE BECAUSE BOTH SATELLITE AND CABLE ENGAGE IN SUBSTANTIAL IN-STATE ACTIVITY IN PROVIDING AN INTERSTATE SERVICE, THE TAX IS GEOGRAPHICALLY NEUTRAL, AND THE PURPOSE OF THE TAX IS PERMISSIBLE

The Court of Appeals correctly concluded – consistent with every other court that has reviewed the same question – that a tax on satellite service but not on cable service does not discriminate against interstate commerce because satellite and cable providers cannot be regarded, respectively, as out-of-state and in-state businesses for Commerce Clause purposes. Because the tax does not discriminate in favor of identifiably in-state interests over identifiably out-of-state interests, Appellants are unable to show how the Satellite Equalization Tax burdens interstate commerce. "The plaintiff satellite companies in the present case have not

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[5] Even the Ohio trial court held that the Satellite Equalization Tax did not discriminate on its face against interstate commerce. (Dec. 26, 2006 Trial Court Decision at 2.)

demonstrated that Ohio's sales tax provisions discriminate against the interstate market for pay television, whether delivered by cable or satellite." (Op. ¶27.) Appellants claim that there is a tax disadvantage on satellite providers, but they are unable to specify how this amounts to discrimination against interstate commerce. "At best, the plaintiffs have persuasively, but ultimately to no end, established that they are more burdened by Ohio's tax provision than comparable interstate cable providers. Discrimination between different forms of interstate commerce is not discrimination *against* interstate commerce." (Op. ¶27.)(Emphasis sic.) Indeed, the U.S. Supreme Court has expressly stated that a tax disadvantage to one group of companies that operate both within and without the state does not constitute discrimination against interstate commerce vis-à-vis other companies that likewise operate both within and without the state. *Amerada Hess Corp. v. Director, Div. of Taxation* (1989), 490 U.S. 66, 78, 109 S.Ct. 1617, 104 L.Ed.2d 58. "[W]hatever disadvantage this . . . might impose on integrated oil companies does not constitute discrimination against interstate commerce. Appellants operate both in New Jersey and outside New Jersey. Similarly, nonproducing retailers may operate both in New Jersey and outside the State." Id.

A. The Satellite Equalization Tax Does Not Favor In-State Interests Over Out-Of-State Interests or Otherwise Impermissibly Burden Interstate Commerce

The Court of Appeals found that "'neither satellite companies nor cable companies are properly characterized as an in-state or out-of-state economic interest,' based upon their physical presence and corporate organization in Ohio and other states." (Op. ¶23, citing *North Carolina*, 178 N.C.App. 659, 632 S.E.2d 543.) The U.S. Supreme Court has consistently held that Commerce Clause discrimination is defined as protection of a local industry at the expense of out-of-state industry. See, e.g., *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgt. Auth.* (2007), 550 U.S. 330, 331, 127 S.Ct. 1786, 167 L.Ed.2d 655; *Oregon Waste Sys., Inc. v.*

Dept. of Environmental Quality (1994), 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (Commerce Clause discrimination defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). See also *West Lynn Creamery, Inc. v. Healy* (1994), 512 U.S. 186, 192, 114 S.Ct. 2205, 129 L.Ed.2d 157; *Associated Indus. v. Lohman* (1994), 511 U.S. 641, 647, 114 S.Ct. 1815, 128 L.Ed.2d 639; *New Energy Co. v. Limbach* (1988), 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302 (Commerce Clause discrimination defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").

The Satellite Companies have an extensive local presence in Ohio. They utilize thousands of miles of fiber optic cable in Ohio to transmit local broadcast signals to their facilities. (See DISH Network Corp., Annual Report (Form 10-K/A) at 5 (Mar. 3, 2008); The DIRECTV Group, Inc., Annual Report (Form 10-K), at 9 (Feb. 25, 2008); May 3, 2004 Affidavit of Michael Dugan ¶8; Stip. of Facts ¶1, 2.) They own and use more than $25 million in machinery and equipment throughout Ohio – equipment essential to receiving and decoding Ohio subscriber signals. (June 14, 2004 Affidavit of Virgil Reed ¶14.) They also transport local signals via terrestrial fiber optic lines to their local digital broadcast operations centers for satellite uplinking. (Reed Aff. ¶14; EchoStar Communications Corp., Annual Report (Form 10-K) ("EchoStar Form 10-K") at 11 (Mar. 15, 2006); DIRECTV Form 10-K at 9; see also Stip. of Facts ¶3, 4.) These fiber optic lines run through the local public rights-of-way and function almost identically to the coaxial and fiber optic cable used by the cable companies to transmit their video programming services.

In addition to their vast network of property located throughout Ohio, the Satellite Companies use a vast network of local authorized retailers and independent contractors to advertise, sell, connect, repair and service the market and equipment necessary to receive satellite television. EchoStar's Form 10-K explains that it "currently distribute[s] EchoStar receiver systems and solicit[s] orders for DISH Network programming services through direct marketers, independent retailers, consumer electronics stores, independent distributors[,] … telecommunications providers . . . [and the Company's] own direct sales channels." (EchoStar Form 10-K at 3; Amicus Brief of Satellite Broadcasting and Communications Assn., et al., at 3 ("Satellite TV Made Significant Inroads Into Ohio's Pay TV Market Through Innovation and Ingenuity").)

Notwithstanding their substantial local presence in Ohio, the Satellite Companies ask this Court to disregard such presence because it is different from, and purportedly less than, the Cable Companies' presence in Ohio. The Satellite Companies argue that Cable Companies use the public rights-of-way to transmit their services and that the Satellite Companies should not be subject to a tax because satellite service does not require use of local rights-of-way. This assertion is simply incorrect; the Satellite Companies also lease property within the state. (Stip. of Facts ¶¶ 3, 4.) In fact, in oral arguments at the Ohio Court of Appeals, counsel for the Satellite Companies admitted that the Satellite Companies use cables but attempted to distinguish the cables stating that they are "not the ground lines of the kind that undergirds every single Ohio street." (Audio CD: Oral Argument in the Ohio Court of Appeals (Aug. 19, 2008) (on file with the Ohio Court of Appeals).) Counsel for the Satellite Companies attempted to clarify this issue by arguing that the Satellite Companies' "lease" of cable and fiber was different from Cable Companies' ownership of similar assets because satellite does not "need the additional rights-of-way as the cable operators do. The cable operators don't piggyback another cable system under the roads. They use their own." (Audio CD: Oral Argument in the Ohio Court of Appeals.)

However, as the Court of Appeals correctly determined, this distinction is simply irrelevant for Commerce Clause purposes. (See Audio CD: Oral Argument in the Ohio Court of Appeals.)

The Satellite Companies also ask this Court to find constitutional significance in the fact that the Cable Companies' local operations in Ohio are carried on through a combination of employees and independent contractors whereas the Satellite Companies' local operations are more heavily staffed by independent contractors. But the Satellite Companies' arguments fly in the face of the U.S. Supreme Court's explicit recognition that for state tax purposes the distinction between the "local" activities of employees, on the one hand, and independent contractors acting on one's behalf, on the other hand, is "without constitutional significance." *Scripto, Inc. v. Carson* (1960), 362 U.S. 207, 211, 80 S.Ct. 619, 4 L.Ed.2d 660; accord, *Tyler Pipe Indus., Inc. v. Wash. Dept. of Revenue* (1987), 483 U.S. 232, 250, 107 S.Ct. 2810, 97 L.Ed.2d 199.

Although the Cable Companies, like the Satellite Companies, have local contacts, the Cable Companies, like the Satellite Companies, are also largely out-of-state enterprises. "State boundaries have little significance in the conduct of the cable television business. Except for public access broadcasting and retransmission of local over-air programming, cable's television programming itself emanates mostly from production sources outside Ohio and is gathered for purposes of retransmission to Ohio customers." (June 15, 2004 Affidavit of Michael G. Smith Aff. ¶11.) In fact, the largest cable company with operations in Ohio, Time Warner Cable, is headquartered outside of Ohio, and the vast majority of its employees and independent contractors are located in other states.[6]

[6] Other cable companies operating in Ohio that are headquartered outside of Ohio include Cox Communications, headquartered in Georgia; Comcast, headquartered in Pennsylvania; and Insight Communications, headquartered in New York.

The Satellite Companies seek to divert this Court's attention from their indisputable in-state presence by asking the Court to answer a question that has not been asked – whether a tax may violate the Commerce Clause even when competing businesses are engaged in some form of interstate commerce? The answer, of course, is "yes"; a tax may violate the Commerce Clause when competing businesses are engaged in interstate commerce. However, for a violation to occur, such a tax must actually interfere with interstate commerce by burdening identifiably in-state economic interests at the expense of identifiably out-of-state economic interests. See, e.g., *United Haulers Assn.*, 550 U.S. at 331. As the preceding discussion makes clear, no such claim can plausibly be made on the facts of this case.

The Satellite Companies cite several cases in support of their position, but in each case, the U.S. Supreme Court invalidated the challenged statute because it burdened identifiably out-of-state interests at the expense of identifiably in-state interests. For example, in *Boston Stock Exch. v. State Tax Commn.* (1977), 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, stock transfer tax provisions directly penalized taxpayers for making stock sales over out-of-state exchanges rather than over in-state exchanges. The out-of-state exchanges brought a Commerce Clause challenge alleging that the higher transfer tax on securities sold *out-of-state* diverted business from their *out-of-state* facilities to identifiably *local* New York exchanges and thus discriminated against interstate commerce. Id. at 320. The U.S. Supreme Court held that the tax discriminated against interstate commerce in violation of the Commerce Clause because: (1) the tax provided a direct commercial advantage to local business at the expense of an identifiably out-of-state business, namely, an out-of-state stock exchange; (2) the tax imposed greater liability on transfers associated with out-of-state sales than on those associated with in-state sales; and (3) the tax diverted interstate commerce to local exchanges. Id. at 328-36. The instant case bears no relationship to *Boston Stock Exchange*. The Satellite Companies are not identifiably out-of-state businesses, because they engage in substantial in-state business activity; their out-of-state sales to customers in other states are not burdened by the Satellite Equalization Tax; and the tax has no discriminatory effect on interstate commerce because both satellite and cable service are interstate services provided by companies headquartered outside the state with a substantial in-state presence.

Indeed, all the cases Appellants cite to support the undisputed proposition that a tax can violate the Commerce Clause even when both companies engage in some form of interstate commerce (Merit Brief at 29-31) turn on the crucial factor missing from this case – that identifiably local interests are favored over identifiably out-of-state interests. See, e.g., *Westinghouse Elec. Corp. v. Tully* (1984), 466 U.S. 388, 104 S.Ct. 1856, 80 L.Ed.2d 388 (the tax scheme subjected export sales from out-of-state locations to a higher tax than sales from in-state locations); *Armco Inc. v. Hardesty* (1984), 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (tax scheme imposed a tax on out-of-state businesses, but expressly exempted in-state businesses); *Granholm v. Heald* (2005), 544 U.S. 460, 456-66, 125 S.Ct. 1885, 161 L.Ed.2d 796 ("[T]he object and effect of the laws [were] the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so. . . . It [was] evident that the object and design of the Michigan and New York statutes [was] to grant in-state wineries a competitive advantage over wineries located beyond the States' borders.").

In contrast, in this case, because there are no identifiably in-state and out-of-state interests, the tax on one set of in-state and out-of-state interests, but not on another set of in-state and out-of-state interests, imposes no burden on interstate commerce, and the Court of Appeals therefore properly dismissed Commerce Clause objections to the Satellite Equalization Tax.[7]

Quite simply, the U.S. Supreme Court has consistently rebuffed Commerce Clause challenges like those advanced by the Satellite Companies – challenges based on two different forms of conducting interstate business through substantial in-state activity rather than any systematic discrimination against out-of-state vis-à-vis in-state economic interests. In *Exxon Corp. v. Governor of Maryland* (1978), 437 U.S. 117, 126-28, 98 S.Ct. 2207, 57 L.Ed.2d 91, the Court rejected a claim of Commerce Clause discrimination with respect to a law prohibiting oil producers from operating retail service stations but allowing interstate retailers, who are not oil producers, to operate such stations. The Court observed that "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce," id. at 126, and that "interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another." Id. at 127. Similarly, in *Amerada Hess Corp.*, 490 U.S. at 78, the Court rejected a challenge to a taxing regime that allegedly discriminated against interstate commerce by favoring one group of taxpayers engaged in both in-state and out-of-state activity over another group of taxpayers engaged in both in-state and out-of-state activity, noting that the different tax consequences "result[] solely from the differences between the nature of their businesses, not the location of their activities." Id. (citing *Exxon*).

[7] In blatant disregard of the Court of Appeals' analysis, Appellants mischaracterize the court's decision as supporting the untenable proposition that there can be no Commerce Clause violation "if both the beneficiary and the victim of discrimination 'are engaged in interstate commerce.'" (Merit Brief at 19.)

In short, the Satellite Companies' novel Commerce Clause analysis finds no support in any of the precedents it cites. There is simply no authority for the astonishing proposition that a tax discriminates against interstate commerce in violation of the Commerce Clause when imposed on one in-state company but not another where both provide an interstate service through substantial in-state activity.

B. The Satellite Equalization Tax is Geographically Neutral

i) Geographic Neutrality

The Satellite Equalization Tax is geographically neutral, imposing a tax based on the nature of activity, not the location. In fact, the Ohio Legislature imposed the general sales tax on all satellite service with no mention of geography or location. The asserted factual foundation underlying the Satellite Companies' constitutional claim is that the Ohio Code defines "satellite broadcasting service" as "the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite." R.C. 5739.01(XX). However, this definition neither implies nor mentions Ohio, "in-state," or any geographic component whatsoever. Rather, the definition of satellite service is simply borrowed from the common and long-standing federal definition of satellite service used in the Telecommunications Act, which imposes an integrated tax on *all* providers of communications service. The Telecommunications Act is geographically neutral, applying the same definition of direct-to-home-satellite services across the United States. See Pub. L. No. 104-104, § 602, 110 Stat. 56, 144 (1996) (reprinted at 47 U.S.C. § 152 note). Rather than signify any geographic location, the phrase "without the use of ground receiving or distribution equipment" has been used for decades, at the federal and state level, to describe satellite service. As a national definition, the description of satellite is geographically neutral and does not create a prerequisite for investment in equipment within any particular state and therefore cannot be the basis of a discrimination claim. See *Amerada Hess*, 490 U.S. at 77 (a tax cannot be said to discriminate based on geographic location when it is borrowed from federal provisions and applies to activity throughout the nation).

Likewise, rather than impose a tax on companies that do not use ground receiving or distribution equipment *in Ohio*, the Satellite Equalization Tax imposes a tax on all satellite providers regardless of geographic location. Further demonstrating the tax's geographic neutrality, the statute's use of the term "ground receiving or distribution equipment" by the Satellite Companies in *any* state (not just Ohio) would take them out of the definition of "satellite broadcasting service" for purposes of the Satellite Equalization Tax. R.C. 5739.01(XX).[8]

Perhaps most fundamentally, the Satellite Equalization Tax's geographic neutrality is demonstrated in the fact that it offers no economic motivation for satellite businesses to relocate to Ohio. See, e.g., *Boston Stock Exch.*, 429 U.S. at 336 (discriminatory taxes based on location will divert interstate commerce into the state). Even if the Satellite Companies were to build "2,000 buildings in Ohio, lay[] at least 60,000 miles of cable within Ohio's borders, and employ[] at least 6,000 workers" (Merit Brief at 25), they would still be subject to the same tax, because they transmit their signals without the use of ground receiving or distribution equipment. In fact, even if the Satellite Companies relocated *all* of their business operations and

[8] Given the insignificant distinction between Satellite Companies' in-state use of ground fiber optic cables and Cable Companies' in-state use of ground distribution and receiving cables, the natural question is why Satellite Companies do not argue that they fall outside the definition of "satellite broadcasting service" which would relieve them from the imposition of Ohio sales tax? Perhaps the Satellite Companies fear that the success of such an argument would jeopardize their federal preemption of locally imposed or administered taxes and fees, and subject them to the same local tax and fee burden as Cable Companies. See Pub. L. No. 104-104, § 602, 110 Stat. 56, 144 (1996) (reprinted in 47 U.S.C. § 152 note).

headquarters to Ohio, they would still be subject to the same Satellite Equalization Tax liability. As the Ohio Court of Appeals aptly observed, "[t]he tax distinction between satellite and cable providers does not discriminate against interstate commerce as a whole, but places a burden against one form of delivering pay television to consumers, and the burden would fall equally on a satellite provider headquartered in Ohio, having all program content, satellite uplink, account services, and customers in-state." (Op. ¶25.) The Satellite Equalization Tax does not impose a tax based upon *where* the satellite companies do their business, but upon *how* they transmit their signals.

The arbitrary construct advanced by Appellants to narrow the Court's focus is even more puzzling when the Satellite Equalization Tax is read in its entirety. The Satellite Companies ask this Court to expand the Commerce Clause's protection to situations in which a company engaged in substantial in-state activity does not own certain types of assets (here, ground receiving and distribution equipment). Imagine a tax on video service that exempted only providers that use satellite dishes attached to consumers' homes, as do satellite companies. Under the theory advanced by the Satellite Companies, the Cable Companies could claim discrimination under the Commerce Clause because they do not use satellite dishes attached to consumers' homes, a quintessentially "in-state" condition of the exemption. This arbitrary construct would, by the Satellite Companies' "logic," classify the Cable Companies as out-of-state. The Satellite Companies' argument is, of course, fundamentally flawed and would represent an unprecedented and unwarranted expansion of the Commerce Clause. The Court of Appeals correctly reasoned that whatever differential treatment may exist between satellite and cable is based not on location, but rather on the differing nature of cable and satellite services. (Op. ¶25.)

ii) The Satellite Equalization Tax is Imposed on a Particular Type of Business Activity

The Satellite Equalization Tax does not discriminate against interstate commerce. Rather, a sales tax is placed on one type of interstate business and not another. As such, the Court of Appeals correctly reasoned that "[d]iscrimination between different forms of interstate commerce is not discrimination *against* interstate commerce." (Op. ¶27.) The Commerce Clause "protects interstate commerce and the interstate market for products, but does not protect 'the particular structure or methods of operation in the retail market,'" and, as is the case here, the "Commerce Clause is not violated when the differential tax treatment of two categories of companies 'results solely from differences between the nature of their businesses, not from the location of their activities.'" (Op. ¶23.)

The Ohio Court of Appeals described the differing nature of satellite and cable's in-state and out-of-state technology in the following way: satellite and cable "are two modes of interstate business. One delivers pay TV programming directly to the consumer's home, via satellite, to a decoder that may be owned either by the consumer or the satellite television provider. The other delivers pay television to the consumer's home, in some cases utilizing a company-owned set-top decoder, via cable from a 'headend' distribution center that receives the imported programming, again often via satellite. Both business models obtain most programming from outside Ohio and redistribute it to consumers in the state. Both also gather local programming and distribute it to Ohio consumers, and, in some areas, consumers in neighboring states where the customary service markets of Ohio stations 'bulge' across state lines. In addition, some locally produced programming is exported nationwide. On an organization level, the two plaintiff satellite television providers are national companies headquartered outside Ohio. Although some small local cable operations may benefit from the sales tax exemption, the cable companies that provide significant competition in the pay television field are very large regional companies, also headquartered outside Ohio." (Op. ¶24.) Reinforcing the Court of Appeals' understanding, the Vice President of Programming for EchoStar admitted that "DBS and cable service providers distribute programming by different types of facilities and different technical means." (April 29, 2004 Affidavit of Eric Sahl ¶3.)

The Court of Appeals correctly relied on *Amerada Hess*'s and *Exxon*'s determination that a tax based not on location but rather on the different nature of two companies is unobjectionable under the Commerce Clause. (Op ¶ 27.) In *Amerada Hess*, a New Jersey statute provided that corporations could not deduct the federal windfall profit tax from their New Jersey corporate income tax, which permitted a deduction for taxes "measured by profits or income." *Amerada Hess*, 490 U.S. at 68. Appellants were thirteen oil companies who did business in New Jersey, but none of their taxable oil production took place in New Jersey. Both the companies that benefited from the deduction and those (like the oil companies) that did not, operated both within and without the state, and any difference in tax effect resulted not from the location of the activities, but from the nature of the companies. Moreover, the tax provision at issue in *Amerada* did not "exert a pressure on an interstate business to conduct more of its activities in New Jersey." Accordingly, the U.S. Supreme Court held that the tax provision did not violate the Commerce Clause. Id. at 77-78.

Likewise, in this case, both the Satellite Companies and the Cable Companies operate both within and without the state, and the tax is geographically neutral. Like the tax regime in *Amerada Hess*, the Satellite Equalization Tax does not create an incentive to do more business in the taxing state than outside of it. As the Court of Appeals correctly noted "[w]hatever different effect the [tax] provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities." (Op. ¶15 (citing *Amerada Hess*, 490 U.S at 78).)

The Satellite Companies ask this Court to ignore the import of *Amerada Hess* and *Exxon,* arguing that a tax imposed on different types of businesses does not save a tax that otherwise discriminates against interstate commerce based on location. (Merit Brief at 39.) This is true, but beside the point, because, as we have demonstrated above, and as the Court of Appeals properly found, the tax at issue here does not differentiate between satellite and cable based on location.

C. The Satellite Equalization Tax was Enacted with the Permissible Objective of Raising Revenue and Equalizing the Overall Tax and Fee Burden on Consumers of Cable and Satellite Video Service

The purpose of the Satellite Equalization Tax was to equalize the taxes and fees on cable and satellite television service and provide consumers with a tax-neutral choice. Moreover, whatever the legislature's purposes, the U.S. Supreme Court has never invalidated a state tax statute based on discriminatory purpose alone. In each case where the Supreme Court reviewed the purpose of a tax statute and concluded discrimination existed, the statute in question had a discriminatory effect.

i) The Purpose of the Satellite Equalization Tax is Permissible, Not Discriminatory

Contrary to Appellants' allegations, the Satellite Equalization Tax was enacted to generate revenue and equalize the tax and fee burden of competing services. R.C. 5739.02. Without offering any legislative statements in support,[9] Appellants contend that the legislature's

[9] Even statements made by the legislature are weak evidence of intent. See, e.g., *Wisc. Pub. Intervenor v. Mortier* (1991), 501 U.S. 597, 622, 111 S.Ct. 2476, 115 L.Ed.2d 532 ("relying

purpose was protectionist. (Merit Brief at 48; Appellants' Memorandum in Support of Jurisdiction at 14.) In fact, however, the express legislative intent of the Satellite Equalization Tax shows otherwise, providing that the tax was imposed "[f]or the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state." R.C. 5739.02.

As the U.S. Supreme Court has "repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.* (2005), 545 U.S. 546, 568, 125 S.Ct. 2611, 162 L.Ed.2d 502. Ignoring this unambiguous precedent, the Satellite Companies nonetheless rely exclusively on extrinsic statements made by proponents of the Satellite Equalization Tax to the effect that its enactment would maintain a significant investment in Ohio's economy. (Merit Brief at 47.) In fact, the U.S. Supreme Court has specifically discredited Appellants' "evidence" of discriminatory purpose, observing that when legislative members assert beneficial economic effects on the local economy in an effort to obtain votes, such statements will not negate the express purposes articulated by the legislature. See *Minn. v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 463, 101 S.Ct. 715, 66 L.Ed.2d 659. In *Clover Leaf*, Respondents advanced a "discriminatory

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upon legislative material to provide an authoritative interpretation of a statutory text . . . would have shocked John Marshall") (Scalia, J., concurring).

purpose" argument, relying on the District Court's finding that the challenged statute's actual basis was to promote local interest at the economic expense of other segments of the dairy and plastic industry. The U.S. Supreme Court rejected this argument because "[i]n [Commerce Clause] analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" Id. at 463 n.7 (quoting *Weinberger v. Wiesenfield* (1975), 420 U.S. 636, 648 n.16, 95 S.Ct. 1225, 43 L.Ed.2d 514). In *Clover Leaf*, a review of the legislative history supported the stated purposes of the Act; to promote conservation and ease solid waste disposal problems. Therefore, the Supreme Court held that beneficial economic side effects on state industry, asserted by some legislative members in attempt to garnish votes, would not invalidate a state statute under the Commerce Clause. *Clover Leaf*, 449 U.S. at 463 n.7.

The statements invoked by Appellants in this case carry even less weight than those at issue in *Clover Leaf*. In the instant matter, the statements on which Appellants rely were not made by legislative members, but rather by lobbyists attempting to get a bill passed. Indeed, the legislature's purpose in passing the bill is expressly found in the bill itself – the same permissible goal as in most tax bills – to provide revenue for the state of Ohio. See R.C. 5739.02.

In fact, nowhere does the Ohio floor debate mention protecting cable to the detriment of satellite or providing an economic advantage to an industry that invests in Ohio's economy. See H.B. 95, Ohio House Senate Transcripts, April - June, 2003. If this Court looks beyond the express statements of intent made by the legislature itself and considers statements made by proponents of the legislation, such statements indicate that the legislature desired to equalize the tax burden between cable and satellite and provide a tax-neutral choice of pay television programming to customers. For example, Representative Bill Seitz discusses one of the issues in regards to imposing a sales tax on both satellite and cable as "[e]xacerbating the competitive advantage of DBS over cable. While the proposal extends the state sales tax to both cable and DBS, federal law prohibits the imposition of local piggyback sales taxes on DBS providers, but does not prohibit the imposition of such tax on cable. Thus, we probably should consider whether we need to prohibit the imposition of local piggyback taxes on cable providers in order to maintain competitive *neutrality*." (Memorandum of Representative Bill Seitz, Mar. 11, 2003; emphasis added.) Such a goal of equalization is permissible. In *Exxon v. Governor of Maryland*, the U.S. Supreme Court sustained a Maryland tax statute that was "designed to correct the inequities in the distribution and pricing of gasoline" between gasoline stations operated by producers or refiners compared with those operated solely by owners. *Exxon*, 437 U.S. at 121. Likewise, in this case, if the Ohio Legislature had any goal beyond raising revenue, it was to correct the inequity in the distribution and pricing of pay television programming between satellite and cable providers.

ii) A Finding of Discriminatory Purpose Alone is Insufficient to Invalidate a Tax

In a facially neutral statute, such as the Satellite Equalization Tax, evidence of discriminatory intent, without a finding of discriminatory effect, is insufficient to invalidate the tax on Commerce Clause grounds. Although discriminatory purpose is sometimes cited as sufficient to invalidate a statute on Commerce Clause grounds,[10] discrimination against interstate commerce cannot be based on wishful thinking. The U.S. Supreme Court has never struck down

[10] The Court frequently adverts to three types of Commerce Clause discrimination: (1) discrimination on its face; (2) discriminatory purpose; and (3) discriminatory effect. See *Amerada Hess*, 490 U.S. at 75. Appellants do not argue that the Satellite Equalization Tax discriminates on its face. (Merit Brief.)

a tax merely because a legislature believed, contrary to fact, that a valid tax would burden interstate commerce. Thus, an examination of U.S. Supreme Court precedent reveals that when the Court condemns statutes with an alleged discriminatory purpose, without exception, it finds either facial discrimination or discrimination in effect as well. See, e.g., *Bacchus Imports Ltd. v. Dias* (1984), 468 U.S. 263, 271, 104 S.Ct. 3049, 82 L.Ed.2d 200 (purpose *and* effect of exemption was discriminatory as it applied to only locally produced beverages); *Westinghouse Electric Co.*, 466 U.S. at 406-07 (tax, which was expressly designed to favor in-state over out-of-state activity also *in effect* impermissibly burdened export shipping from other states); *Maryland v. Louisiana* (1981), 451 U.S. 725, 756, 101 S.Ct. 2114, 68 L.Ed.2d 576 (holding that tax scheme had obvious *economic effect* of discriminating against interstate commerce in favor of local interest); *Halliburton Oil Well Cementing Co. v. Reily* (1963), 373 U.S. 64, 73-74, 83 S.Ct. 1201, 10 L.Ed.2d 202 (holding that tax was impermissibly discriminatory because *effect of the tax* was to favor local users who wished to dispose of equipment over similarly situated out-of-state users). In short, the U.S. Supreme Court has never found a Commerce Clause violation on discriminatory purpose grounds alone.

II. EVERY OTHER COURT THAT HAS CONSIDERED CLAIMS OF DISCRIMINATION SIMILAR TO THOSE ADVANCED HERE HAS REJECTED THEM.

If any further demonstration were needed that the Satellite Companies' position is indefensible, it can be found in the uniform decisions of other courts flatly rejecting the view that differential treatment of the cable industry and the satellite industry can be characterized as discrimination against interstate commerce. The Court of Appeals correctly noted that "the unanimous weight of precedent [in pay television cases] lies on the side of taxing authorities in cases involving differential taxation for satellite and cable television providers . . . all reaching outcomes in favor of taxing authorities." (Op. ¶19.) The uniform decisions of other courts flatly reject the view that differential treatment of the cable industry and the satellite industry can be characterized as discrimination against interstate commerce. See *DIRECTV, Inc. v. North Carolina* (2006), 178 N.C.App. 659, 632 S.E.2d 543; *DIRECTV, Inc. v. Treesh* (E.D.Ky. 2006), 469 F.Supp.2d 425, affirmed (C.A.6, 2007), 487 F.3d 471, certiorari denied (2008), 128 S.Ct. 1876, 107 L.Ed.2d 746; *DIRECTV, Inc. v. Tolson* (E.D.N.C. 2007), 498 F.Supp.2d 784, affirmed (C.A.4, 2008), 513 F.3d 119.

The Court of Appeals focused its discussion on *DIRECTV, Inc. v. North Carolina*, and *DIRECTV, Inc. v. Treesh*, concluding that, as in this case, both those courts properly determined "that the differential taxation between cable television and satellite television providers did not discriminate based upon geographic location or domicile, but rather upon the use of different technologies under different business models." (Op. ¶22.) It further noted that both cases were persuasive because they "were decided on essentially identical pertinent facts." (Op. ¶23.)

DIRECTV, Inc. v. North Carolina involved a challenge to a statute virtually identical to the statute at issue here – a sales tax on satellite but not on cable services – and the North Carolina Court of Appeals squarely rejected the false premises that underlie the trial court's decision here. First, the court recognized what the trial court ignored, namely, that both satellite and cable use out-of-state and in-state facilities to provide their services.

"Notwithstanding th[e] differences in the provision of television programming to their customers, satellite and cable companies utilize satellites at some point to provide service to their subscribers, and both require ground equipment located in North Carolina and outside North Carolina to effect delivery of their programming to North Carolina subscribers." 178 N.C.App. 660-61. Based on this understanding, the court, relying on controlling U.S. Supreme Court precedent, had little difficulty concluding that North Carolina's tax regime did not discriminate against interstate commerce. "In the case *sub judice,* the relevant market is the interstate market for multichannel video programming. The relevant retailers are multichannel video programming service providers, including those companies that deliver programming by satellite and those that deliver programming by cable. Based on the United States Supreme Court's reasoning in *Amerada Hess* and *Exxon Corp.,* we conclude that the dormant Commerce Clause prohibits discrimination against the interstate marketing for multichannel video programming, but that it does not necessarily prohibit discrimination against programmers in that market who deliver programming by satellite as opposed to cable." Id. at 666-67.

In *DIRECTV, Inc. v. Treesh,* the United States District Court for the Eastern District of Kentucky, like the North Carolina Court of Appeals, repudiated the simplistic factual assumption of the Ohio trial court that cable and satellite can be characterized as "in-state" and "out-of-state" economic interests for Commerce Clause purposes. The court declared "there is no basis from which this Court can determine that cable-delivered programming is an industry any more local to Kentucky than satellite-delivered programming. Furthermore, the statute would inflict the same burden on an in-state satellite company as on an out-of-state satellite company and the same benefit on an out-of-state cable company as an in-state cable company. Finally, the fact that a statute would burden certain out-of-state firms does not establish a violation of the dormant Commerce Clause." 469 F.Supp.2d at 443.

Additionally, in *DIRECTV, Inc. v. Tolson,* although this case was determined largely on procedural grounds, the court briefly addressed the Satellite Companies' claims of Commerce Clause discrimination on the merits and, citing the cases discussed above, declared: "Plaintiffs have twice lost in suits applying the exact same theory, in *DIRECTV, Inc. v. Treesh* and *Directv, Inc. v. State.* The court finds these opinions correct in their analysis of dormant Commerce

Clause jurisprudence . . ." 498 F.Supp.2d at 800. Therefore, to be consistent with every court to consider similar Commerce Clause claims involving the Satellite and Cable Companies, this Court should hold that the Satellite Equalization Tax does not violate the Commerce Clause.

III. AMICI CURIAE IN SUPPORT OF APPELLANTS ADD NOTHING TO APPELLANTS' CASE

Amici curiae, filing in support of Appellants, add nothing to Appellants' flawed theory and, insofar as they say anything new, their points are misguided. As noted above, in this case, there are no identifiably in-state or out-of-state interests and the Satellite Equalization Tax is geographically neutral. Thus amici's legal arguments as to why the Satellite Equalization Tax discriminates against interstate commerce suffer from precisely the same defects that underlie Appellants' arguments. Amici offer very little in addition to Appellants' legal arguments. Moreover, their additional arguments are not only irrelevant to the merits of this Court's decision, but are also incorrect.

Contrary to the National Rural Telecommunications Cooperative Amicus Brief ("NRTC Brief"), the Satellite Equalization Tax is not anti-competitive, but rather promotes competition on grounds other than taxes and regulatory fees. Market forces should drive consumer demand for satellite or cable television, not a tax and fee structure that, prior to enactment of the Satellite Equalization Tax, forced cable to bear an unequal burden. Since the enactment of the Satellite Equalization Tax, both the local tax imposed on cable and the state tax imposed on satellite are levied on gross receipts and charged directly to consumers as line items on their bills. The Satellite Equalization Tax thus neutralizes the tax paid by customers so that supply and demand can govern competition, rather than a tax burden that was legislatively imposed unequally on the Cable Companies as compared to the Satellite Companies. As the playing field between satellite and cable is equalized, the Satellite and Cable Companies are forced to gain and retain customers based on quality and service. In this way, the Satellite Equalization Tax promotes competition between the satellite and cable industries. Thus, contrary to what the NRTC Brief stipulates, Ohio taxpayers and consumers are not victimized by the Satellite Equalization Tax, because the tax effectively affords customers tax-neutral video programming service options.

The Specialty Wine Retailers Association's Amicus Brief ("SWRA Brief") erroneously claims that Court of Appeals' decision is bad for any company wishing to do business in Ohio. (Id. at 1.) It states that "almost any discriminatory statute or regulation can be recast as a difference in the business model of the favored and disfavored entities" (id. at 3) – ignoring, as do Appellants, that different tax treatment based on the different nature of businesses is permissible only when there is no discrimination based on location. The Court of Appeals did not carve out a contrary rule. The Specialty Wine Industry and accompanying Commerce Clause cases involving wine sales (id. at 11) have no relevance to the instant dispute between satellite and cable. Courts have already spoken on the satellite versus cable Commerce Clause issue and have consistently held that favoring the latter over the former does not constitute discrimination against interstate commerce.

Finally, the Satellite Broadcasting and Communications Association Amicus Brief ("SBCA Brief") erroneously states that the Court of Appeals did not look beyond the face of the statute to determine that it did not discriminate against interstate commerce. "It would be a grave miscarriage of justice for any court to stamp its seal of approval on a tax that was enacted with the intent to discriminate against interstate commerce simply because the unconstitutional purpose is not explicitly described on the face of the statute. Yet that is precisely what happened in this case." (Id. at 10.) Essentially, the SBCA incorrectly accused the Court of Appeals of not analyzing whether the Satellite Equalization Tax discriminated in purpose or effect. "In failing to consider evidence relevant to determining the legislative intent motivating the enactment of the satellite-only tax or the practical effects of its enactment, the Court of Appeals has created a dangerous precedent . . . ." (Id. at 8-9.) Reiterating the Court of Appeals' holding and reasoning is unnecessary because the opinion speaks for itself; it explored both of those inquiries in depth. (Op. ¶1-35.)

For all the reasons outlined in the amici brief of Time Warner Cable, Comcast, and Cox Communications, amici's briefs in support of Appellants are misguided as to the legal issues and irrelevant to this Court's final determination.

CONCLUSION

For the foregoing reasons, and also for those submitted by Appellee, amici respectfully request that this Court affirm the decision of the Court of Appeals and hold that the Satellite Equalization Tax does not violate the Commerce Clause of the United States Constitution.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of Amici Curiae Time Warner Cable, Comcast, and Cox Communications in Support of Defendant-Appellee Richard Levin, Tax Commissioner of Ohio was served by U.S. mail, prepaid postage, this 14th day of December, 2009, upon the following:

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